Supreme Court, U.S.
FILED

05 144 JUL 27 2005

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

BANK OF LOUISIANA,
PETITIONER

v.

CRAIG'S STORES OF TEXAS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HENRY L. KLEIN
Counsel of Record
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971
Attorney for Petitioner

CURRY & TAYLOR • WASH D.C. • (202) 223-3160 • USSCINFO.COM

QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals nullify this Court's decision in *Northwestern Fuel Co. v. Brock*, 139 U.S. 216(1891) and usurp the primary jurisdiction of the district court when it ordered the disbursement of funds held in the district court's registry without allowing the lower court to determine the funds' rightful owner consonant with principles of restitution?

2. Where there is no affirmative statutory grant of power allowing the court of appeals to order the disbursement of funds held in *another* federal court's depositary, has the appellate court exceeded its Article III powers, invoking this Court's duty of superintendence over the federal judiciary?

3. Does the court of appeals' decision ordering the district court to disburse its depositary funds to one of the parties *without a hearing* violate due process and deprive the affected party of the opportunity to show its right to the funds as a matter of restitution?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

CITATIONS OF OPINIONS AND ORDERS 1

BASIS FOR JURISDICTION IN THIS COURT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

ARGUMENT SUPPORTING ALLOWANCE OF THE WRIT 16

1. The Decision Below Is In Conflict With *Northwestern Fuel Co. v. Brock*, 139 U.S. 216(1891), Which Recognizes The Primary Jurisdiction Of The District Court As The Depositary Court To Determine Whether The Bank Was Entitled To Restitution After the Court Of Appeals Found There Was No Subject Matter Jurisdiction To Hear This Controversy 16

2. The Court of Appeals Acted Beyond Its Jurisdiction And Usurped The Primary Jurisdiction Of The District Court When It Directed The Lower Court To Disburse To Craig's The Money Held In Its Depositary 24

3. The Court Of Appeals' Order Denied The Bank A Fair Hearing On Its Claim That The Money Deposited By Craig's In The District Court's Registry As A Matter Of Restitution Should Be Disbursed To the Bank 27

CONCLUSION 30

APPENDIX

Circuit Court Opinion (03/04/05) 1a

District Court Order Disbursing Funds (09/12/03) 23a

Circuit Court Order Denying Rehearing (05/02/05) 25a

Bankruptcy Court Agreed Order Regarding Request for Preliminary Injunction (10/02/96) 27a

TABLE OF AUTHORITIES

CASES

ARKADELPHIA CO. V. ST. LOUIS S. W. RY. CO., 249 U.S. 134 (1919) 20

ARMSTRONG V. MANZO, 380 U.S. 545 (1965) 29

ATLANTIC COAST LINE V. FLORIDA, 295 U.S. 3014 (1935) 19, 20, 27

B. & O. R. CO. V. UNITED STATES, 279 U.S. 781 (1929) 19, 20, 22

BANK OF THE UNITED STATES V. BANK OF WASHINGTON, 31 U.S. (6 PET.) 8 (1832) 18, 19

BOARD OF REGENTS V. ROTH, 408 U.S. 564 (19972) 29

BROCK V. NORTHWESTERN FUEL CO., 130 U.S. 341 (1889) 17

BROWN V. WALTER, 62 F. 2D 798 (2ND CIR. 1933) 23

CARLISLE V. UNITED STATES, 517 U.S. 416 (1996) 23

CRAIG'S STORES OF TEXAS, INC. V. BANK OF LOUISIANA, 402 F.3D 522 (2005) 1

DRED SCOTT CASE, 60 U.S. (19 HOW.) 393 (1856) 25

EX PARTE MCCARDLE, 74 U.S. (7 WALL.) 506 (1868) 24, 25, 27

HANFORD V. DAVIES, 163 U.S. 273 (1896) 24

HORNTHALL V. THE COLLECTOR, 76 U.S. (9 WALL.) 560 (1869) 25

IN RE CRAIG'S STORES OF TEXAS, INC., 266 F. 3D 388 (5TH CIR. 2001) 10, 11, 13

INSURANCE CORP. V. COMPAGNIE DES BAUXITES, 456 U.S. 694 (1982) 24

M.C. & L.M. RAILWAY CO. V. SWAN, 111 U.S. 379 (1884) 25

MATTHEWS V. ELDRIDGE, 424 U.S. 319 (1976) 29

MAYOR V. COOPER, 73 U.S. (6 WALL.) 247 (1867) 25

MORGAN V. UNITED STATES, 304 U.S. 1 (1938) 20, 21

NORTHWESTERN FUEL CO. V. BROCK, 139 U.S. 216 (1891) ..... *passim*

OWEN EQUIPMENT & ERECTION CO. V. KROGER, 437 U.S. 365 (1978) 24

TURNER V. BANK OF NORTH AMERICA, 4 U.S. (4 DALL.) 8 (1799) 25

UNITED STATES V. MORGAN, 307 U.S. 183 (1939) 21, 22, 29

STATUTES

18 Stat. 470 17

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1334 6

28 U.S.C. Section 1334(b) 3

28 U.S.C. Section 2041 ..... 3, 25

28 U.S.C. Section 2041 ..... 4, 14, 15, 16

28 U.S.C. Section 2042 ..... *passim*

28 U.S.C. Section 2101(c) 2

RULES

Fed. R. Civ. P. 67 ..... 14, 16

Restatement of Restitution Section 74 23

Revised Supreme Court Rule 13.3 2

CITATIONS OF OPINIONS AND ORDERS

The published opinion of the court of appeals for the Fifth Circuit in *In the Matter of Craig's Stores of Texas, Inc., Debtor; Craig's Stores of Texas, Inc. v. Bank of Louisiana*, 402 F.3d 522, C.A. No. 03-20888, filed March 4, 2005, reversing in a majority decision the district court's Order Disbursing Funds, is set forth in the Appendix hereto(App. 1-22).

The unpublished Order of the United States District Court for the Southern District of Texas, Houston Division, in *In Re: Craig's Stores of Texas, Inc., Debtor; Craig's Stores of Texas, Inc. v. Bank of Louisiana*(Civil Action No. H-97-3753 and Adversary Proceeding No. 96-4541), dated September 11, 2003, disbursing funds to the Bank of Louisiana, is set forth in the Appendix hereto (App. 23-24).

The unpublished order of the court of appeals for the Fifth Circuit in *In the Matter of Craig's Stores of Texas, Inc., Debtor; Craig's Stores of Texas, Inc. v. Bank of Louisiana*, C.A. No. 03-20888, filed May 2, 2005, denying the Bank of Louisiana's timely filed petition for rehearing *en banc*, is set forth in the Appendix hereto(App. 25-26).

The Agreed Upon Order Regarding Request For Preliminary Injunction in *In the Matter of Craig's Stores of Texas, Inc., Debtor; Bank of Louisiana v. Craig's Stores of Texas, Inc., and the Official Committee of Unsecured Creditors*, Bankruptcy Case No. 93-48674-H3-11, Adversary Proceeding No. 96-4541, dated October 2, 1996, in the Bankruptcy Court for the Southern District of Texas, Houston Division, is set forth in the Appendix

hereto(App. 27-34).

BASIS FOR JURISDICTION IN THIS COURT

The majority decision of the United States Court of Appeals for the Fifth Circuit reversing the district court's Order Disbursing Funds was entered on March 4, 2005; and its order denying the Petitioner Bank of Louisiana's timely filed petition for rehearing *en banc* was filed on May 2, 2005 (App.1;25-26).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the Petitioner's timely filed petition for rehearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS IMPLICATED BY THIS PETITION

United States Constitution, Article III, Section 1:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. Section 1334(b):

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. Section 2041:

All monies paid into any court of the United States, or received by the officers thereof, in any case pending or adjudicated in such court, hall be forthwith deposited with the Treasurer of the United States or a designated depositary, in the name and to the credit of such court.

This section shall not prevent the delivery of any such money to the rightful owners upon security, according to agreement of parties, under the direction of the court.

28 U.S.C. Section 2042:

No money deposited under section 2041 of this title except shall be withdrawn except by order of court....

Fed. R. Civ. P. 67:

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money..., a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of

> such sum..., whether or not that party claims all or any part of the sum.... Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions Title 28, U.S.C. Sections 2041, and 2042...or any like statute....

STATEMENT OF THE CASE

In November of 1989, the Petitioner Bank of Louisiana ("the Bank") contracted with the Respondent Craig's Stores of Texas, Inc. ("Craig's") to administer Craig's private-label credit cards and to buy Craig's accounts receivables generated through the use of its credit card. This made it possible for every sale made by Craig's to be a "cash sale;" and Craig's did not have to fund, service, bill or collect its accounts receivables. The benefit to the Bank was that it would collect 18% on the outstanding balances.

The contract made Craig's responsible for all bad debts and delinquencies. It gave the Bank recourse against Craig's so that Craig's was required to buy back from the Bank any accounts receivables which failed to pay or were charged off by the Bank. In order to assure the Bank of Craig's repurchase of these nonperforming accounts, Craig's maintained with the Bank a reserve account equal to 5% of the outstanding accounts or 100% of the accounts which were over 90 days past due. To maintain this reserve, Craig's deposited 2% of every sale it made into this reserve account with the Bank.

The parties' contractual arrangement continued after Craig's sought protection in the United States

Bankruptcy Court for the Southern District of Texas, Houston Division, under Chapter 11 of the Bankruptcy Code in 1993; and the contract was assumed as part of Craig's reorganization plan confirmed in December of 1994. The confirmation order retained jurisdiction of the bankruptcy court but only to the extent of matters regarding confirmation and the completion of Craig's plan to reorganize.

In May of 1995, Craig's began to close its stores, dramatically eliminating sales and diminishing its credit cardholders' interest in paying outstanding charges. Ongoing sales were the lifeblood of the reserve account which Craig's was obligated to maintain with the Bank under its contract. With the dramatic drop in sales, the reserve account was soon completely depleted.

Craig's failure to maintain an adequate reserve was a material breach of the contract which was assumed as part of Craig's reorganization plan; and on July 29, 1996, the Bank, having discovered that Craig's was about to dispose of funds as the result of a court-approved settlement with Norwest Bank, demanded that Craig's first replenish the reserve account. It brought a motion in bankruptcy court to cure defaults and to provide adequate assurance of future performance of the confirmed plan or, in the alternative, to convert the case to a Chapter 7 proceeding.

On the same day, July 29, 1996, the Bank also filed a complaint against Craig's in the federal district court for the Southern District of Texas, Houston Division, seeking to enjoin Craig's from disposing of these funds which it claimed should have been dedicated to Craig's reserve account with the Bank incident to the contract to